82-261

No.

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IN THE

Supreme Court of the United States

October Term, 1981

JOHN W. FRIEL,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where a claim for fire loss to a property in Philadelphia was being adjusted solely in Philadelphia between a Philadelphia attorney and a Philadelphia adjusting agency, can proof that a letter was mailed by the attorney from Philadelphia directly to the insurance company in Connecticut, with a carbon copy to the Philadelphia adjusting agency, support a conviction for mail fraud under 18 U. S. C. § 1341 without proof that Defendant caused the mails to be used or that he knew they would be used?

2. Where there was no evidence showing that the letter was actually received in the mails in Connecticut or that the Defendant mailed it or caused it to be mailed, and the trial court permitted the jury to find such mailing based on custom or usage which was not proved, does this support a conviction for mail fraud under 18 U. S. C. § 1341?

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JOHN W. FRIEL,

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v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN W. FRIEL, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on June 15, 1982.

OPINIONS BELOW

On June 15, 1982 the United States Court of Appeals for the Third Circuit entered a Judgment Order, which has not been officially reported, but is reproduced in Appendix A, *infra*, pages A1-A2, affirming the judgment of conviction and sentence entered by the United States District Court for the Eastern District of Pennsylvania on August 28, 1981. On that date, the Honorable Louis H. Pollak, Judge of that Court, had sentenced Petitioner to a term of imprisonment for three years. On August 19, 1981 Judge Pollak had filed a Memorandum Order denying Post-Trial Motions, which has not been officially reported, and which is reproduced in Appendix B, *infra*, pages A3-A4. A copy of the Judgment and Commitment Order is reproduced herein as Appendix C, *infra*, pages A5-A6.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, pages A1-A2) affirming the judgment of the District Court, was entered on June 15, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISION INVOLVED

The mail fraud statute, 18 U. S. C. § 1341, provides in pertinent part:

"§ 1341. Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioner John W. Friel and Gary Richard Lance were indicted on September 17, 1980 and charged with two counts of mail fraud in violation of 18 U. S. C. § 1341. Pre-Trial Motions for suppression of tape-recorded conversations were denied, a jury was selected and the government presented evidence for more than eight days. At the close of the government's case, the trial Judge entered a judgment of acquittal as to both defendants on the second count, finding that the evidence was insufficient to go to the jury. (Appendix B, *infra*, page A-3). Defense and rebuttal evidence was presented for an additional five days, and the case was finally submitted to the jury, which found defendant Lance not guilty, but adjudged defendant Friel guilty on Count 1. Timely Post-Trial Motions were filed and on August 19, 1981 were denied by Judge Pollak. On August 28, 1981 Judge Pollak sentenced defendant Friel to imprisonment for three years. A timely appeal was filed and argued and on June 15, 1982 the Court of Appeals entered a Judgment Order affirming the conviction and sentence.

The evidence at trial showed that defendant Friel was the President and part owner of a corporation which operated a restaurant-tavern called Bramwell's, located at 200 S. Camac Street in Philadelphia, Pennsylvania. On May 7, 1979 Bramwell's and its contents were damaged by a fire, which the government claimed had been set by Friel and Lance. The government's theory was that in October, 1978 defendant had secured insurance protection of $100,000.00 for contents and $40,000.00 for business interruption. They claimed that during the next few months the company and Friel incurred heavy debts which they were unable to pay, and that defendants Friel and Lance devised a scheme to defraud the insurance

company by removing valuable items from the premises, setting fire to the premises and making claim from the insurance company for losses for paintings and antiques which had not been lost but which had been removed, for food which had not been lost or damaged, and for food which had been sold to the public through another business. In Count 1 of the indictment both defendants were charged with causing on June 1, 1979 to be delivered by the United States Post Office a Certified letter addressed to the insurance company in Hartford, Connecticut containing two proofs of loss for business interruption and loss of contents; in Count 2 they were charged with causing on August 22, 1979 to be delivered by United States Post Office a Sworn Statement in Proof of Loss for loss of contents. The evidence at trial relating to the proof of arson consisted largely of testimony of "experts", who were contradicted by defense experts, setting forth their opinion as to the incendiary nature of the fire; as well as testimony of damaging statements allegedly made by defendants. The evidence relating to the mailings was largely circumstantial. An employee of the General Adjustment Bureau, a Philadelphia company which represented the insurance company, inspected the premises on May 8, 1979, the day after the fire. He directed Friel to make an inventory of everything that was in the building on the date of the fire, to attach a value thereto, and to submit a proof of loss. A letter from Friel's attorney to the Philadelphia adjuster was the subject of Count 2, which was dismissed because of lack of evidence that it was actually mailed.

An employee of the insurance company in its Hartford office testified that he received a letter from the attorney for Mr. Friel. Although it was only a photocopy of an unsigned letter, rather than the original, and it was not in an envelope, nor was it stamped in as being re-

ceived in a mailroom, nonetheless the witness testified that he believed it had been received in the mail because usually that kind of material came in the mail. The Court admitted that testimony without any further proof of custom or usage.

It was on the basis of this testimony and letter, which was addressed to the insurance company in Hartford by an attorney for Bramwell's, referring to two proofs of loss, reflecting a carbon copy to the General Adjustment Bureau in Philadelphia, that the jury was permitted to conclude that it was mailed, since it bore a typed notation on the bottom, stating "certified mail, return receipt requested." A copy of that letter is attached hereto as Appendix D, *infra*, page A7. However, no evidence was offered that it was actually received in the mail, no return receipt was produced, no postal records were introduced to show that it was delivered by certified mail, nor was the attorney called to testify as to whether he had actually placed it in the mail.

As already noted, the jury found defendant Friel guilty, but found defendant Lance not guilty. In ruling on Post-Trial Motions, the trial Judge concluded that a reasonable jury could conclude that the letter and its enclosure were sent through the mails (Appendix B, *infra*, page A4). The Court of Appeals, in affirming the judgment, rejected the contention that the District Court had erred in denying a Motion for Judgment of Acquittal in that Appellee had failed to prove a violation of § 1341 (Appendix A, *infra*, p. A1). However, neither Court addressed the question of whether the conviction could be sustained under this statute without proof that defendant caused the mails to be used or knew that they would be used.

REASONS FOR GRANTING THE WRIT

1. One Mailing Cannot Support a Conviction Under § 1341 Without Proof That the Use of the Mail Was Caused by or Known by Defendant as an Essential Element of a Scheme to Defraud.

The mail fraud statute provides that whoever knowingly causes to be delivered by mail any matter for the purposes of executing a scheme to defraud is guilty of a crime. In *United States v. Maze*, 414 U. S. 395 (1974), *United States v. Sampson*, 371 U. S. 75 (1962), *Parr v. United States*, 363 U. S. 370 (1960), *Pereira v. United States*, 347 U. S. 1 (1954), and *Kann v. United States*, 323 U. S. 88 (1944), this Court discussed the scope of the mail fraud statutes and tried to establish guidelines as to what constitutes a knowing use of the mails within the meaning of the statute. In *Maze*, the Court quoted *Kann* as requiring that the mailing must be "for the purpose of executing the scheme, as the statute requires," but "it is not necessary that the scheme contemplates the use of the mails as an essential element," citing *Pereira*. The Court analyzed *Parr* as requiring a sufficient connection between the mailing and the execution of the scheme to fall within the statute. In *Parr* and *Kann*, this Court enunciated the proposition that the mere concurrence of a violation of the general purpose which the mail fraud statute is designed to serve and a use of interstate facilities does not make an act, even though morally reprehensible and violative of state law, into a federal crime. See *United States v. Wechsler*, 392 F. 2d 344, 352 (4th Cir. 1968).

However, in the case at bar, the question is whether the statute as interpreted by this Court encompasses a situation where a Connecticut Insurance Company, which utilizes a Philadelphia adjustment agency to conduct per-

sonal negotiation to settle a claim arising out of a Philadelphia fire, falls within the mail fraud Act merely because counsel sends one letter in the mail directly to the Connecticut insurance company, even though the evidence does not show that the defendant authorized his attorney to send that letter in the mail, that he knew that it would be sent in the mail, or that he could reasonably have contemplated that it would be sent in the mail.[1] In other words, there is little doubt that the letter, containing the proofs of loss, was essential to the insurance claim, and if the claim was fraudulent, then it could be considered an essential part of the fraud; however, does the mere incidental use of the mails render it an essential part of the scheme within the requirements of *Pereira* and *Sampson*, or does it lack a sufficient connection between the mailing and the execution of the scheme, as set forth in *Kann*, *Parr* and *Maze*, to bring it within the statute. Neither the Trial Court nor the Court of Appeals here passed on the issue of whether a single uncontemplated mailing falls within the statute. Only this Court can definitively establish the outer limits and scope of the statute for the guidance of federal courts throughout the country.

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1. In fact, since the evidence demonstrates that all the negotiations took place solely in Philadelphia, and that was the reason the insurance company utilized a local adjusting bureau, it appears that the mailing here was an uncontemplated aberration.

2. A Conviction Under Section 1341 Cannot Stand Without Proof of Actual Mailing and Without Proof of Custom or Usage.

There have been many appellate decisions, besides those decisions of this Court cited in the first point above, which establish the principle that the knowing use of the mails for the purpose of the alleged crime is an essential element of the offense. These cases point out clearly that the government must prove beyond a reasonable doubt that the defendant used, or caused to be used, the postal service. See, *e.g.*, *United States v. Dondich*, 506 F. 2d 1009, 1010 (9th Cir. 1974), citing *Bolen v. United States*, 303 F. 2d 870 (9th Cir. 1962). However, many of these Circuit Courts differ in their conclusion as to whether there must be actual proof of mailing, or whether testimony of ordinary mailing practices, constituting evidence of custom and usage, will suffice within the statute. Cases arising in the Second, Seventh and Ninth Circuits have held that such evidence is not sufficient. See *United States v. Baker*, 50 F. 2d 122 (2nd Cir. 1931); *United States v. Joyce*, 449 F. 2d 9 (7th Cir. 1974), *cert. denied*, 419 U. S. 1031 (1974); and *United States v. Dondich*, *supra* (9th Cir. 1974). On the other hand, cases in the Eighth and Tenth Circuits, as well as other cases in the Second and Seventh Circuits, arrive at contrary conclusions. See *United States v. Cady*, 567 F. 2d 771 (8th Cir. 1977); *United States v. Gomez*, 636 F. 2d 295 (10th Cir. 1981); *cf. United States v. Ziperstein*, 601 F. 2d 281 (7th Cir. 1979), *United States v. Fassoulis*, 445 F. 2d 13 (2nd Cir. 1971), and *United States v. Leathers*, 135 F. 2d 507 (2nd Cir. 1943).

In the case at bar, as already noted, the testimony showed that the Connecticut insurance company utilized the services of a Philadelphia adjusting agency to nego-

tiate directly and personally with counsel for defendant over the loss which occurred in Philadelphia. Most of the transactions were carried on in person. In fact, it was this set of facts which led the Trial Judge to grant a judgment of acquittal on Count 2, which dealt with a letter addressed to the adjustment bureau in Philadelphia, since he could not be sure that it was sent in the mails, and it could have been hand delivered. The first Count, however, dealt with a letter which was addressed to the insurance company in Connecticut, reflecting a carbon copy to the adjustment bureau in Philadelphia, and bore a notation that it was to go by certified mail, return receipt requested. Although there was no evidence offered that it was actually received in the mail by the company in Connecticut, no return receipt was produced, no postal records were introduced to show that it had been delivered by certified mail, the attorney who wrote it was not called to testify as to whether he or his secretary actually placed it in the mail, the trial Judge allowed the jury to find that it was sent in the mail simply because the insurance company representative said that usually this kind of material came in the mail. Whether or not that was a permissible inference for the jury to draw was a question raised on Post-Trial Motions, and the trial Judge ruled that it was a proper inference. The Court of Appeals apparently agreed, since it affirmed. However, even assuming this to be so, neither Court addressed the question of whether the mailing of one letter would bring this transaction within the meaning of the mail fraud statute, without proof that defendant actually caused the letter to be mailed as an essential part of the scheme, or knew or reasonably contemplated that it would be mailed. Furthermore, the Court permitted the jury to find that there was circumstantial evidence of mailing from the

mere statement by the witness that it usually occurred this way, without any proof that there was such a custom or usage. The Court of Appeals seems to have approved this procedure, although this is not clearly spelled out in its Opinion. This apparently brings this Circuit in line with some of the decisions referred to above, but puts them in conflict with the decisions in the Second, Seventh and Ninth Circuits, as cited above. Only a decision by this Court can resolve this conflict.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted as to both of the questions presented herein.

Respectfully submitted,

STANFORD SHMUKLER
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2711

UNITED STATES OF AMERICA

v.

JOHN W. FRIEL,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
C. A. No. 80-00315-01

Argued June 7, 1982

Before: ADAMS and WEIS, *Circuit Judges* and
BLOCH, *District Judge* *

Judgment Order

After considering all contentions raised by appellant, namely, that the district court erred (1) in denying appellant's several motions for judgment of acquittal, in that the appellee failed to prove a violation of 18 U.S.C. § 1341 as set forth in the indictment, (2) in denying

* Hon. Alan N. Bloch, United States District Court for the Western District of Pennsylvania, sitting by designation.

appellant's motion for a mistrial when the principal witness for the appellee spontaneously made reference to the fact that she had taken a lie detector test; (3) in refusing to make available to appellant matters bearing on the credibility of a crucial prosecution witness, Rachel Light, allegedly confidential, because it was part of her probation file; and (4) in failing properly to charge the jury on the question of mailing, in the absence of any direct evidence presented by appellee of the use of the mails; (5) in failing to grant a new trial when the United States Attorney engaged in prejudicial misconduct by deliberately and intentionally, in an effort to inflame the jury, made references to the sexual preferences of the appellant and his witnesses; and (6) by failing to grant a new trial when the United States Attorney engaged in prejudicial misconduct by suppressing and concealing reports of a fire expert, which were exulpatory [sic] and consistent with appellant's defense; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

ARLIN M. ADAMS, *Circuit Judge*

ATTEST:

SALLY MRVOS
Sally Mrvos, *Clerk*

DATED: June 15, 1982

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 80-315

UNITED STATES OF AMERICA

v.

JOHN W. FRIEL

Memorandum-Order

AUGUST 19, 1981

POLLAK, *J.*

John W. Friel and Gary Richard Lance were indicted on September 17, 1980 for mail fraud in connection with an arson scheme. 18 U.S.C. § 1341. After a series of continuances at the request of defense counsel, the trial commenced on February 9, 1981, and culminated in Lance's acquittal and Friel's conviction on one count of mail fraud.[1] Sentencing was set for April 14, 1981. Motions for a new trial and judgment of acquittal were filed March 9, 1981, along with Friel's request that his sentencing be continued until after the notes of testimony had been transcribed and made the basis for additional motions for a new trial or judgment of acquittal. I granted that request.

1. At the close of the Government's case, I entered a judgment of acquittal as to both defendants on the second count of mail fraud, having found that the evidence as to mailing was insufficient to go to the jury.

On July 10, 1981, after the transcription of the notes of testimony, the "completed motion" for a new trial and/or judgment of acquittal was finally filed. The Government's reply was filed July 20, 1981.

The only issue discussed in Friel's memorandum is whether the Government offered sufficient proof of mailing, with respect to Exhibit 7, a letter mailed by Friel's then attorney, Malcolm Waldron, Jr., Esq., to the Security Insurance Group in Hartford, Connecticut, which enclosed a proof of loss statement. That statement described losses from a fire which the Government alleged Friel had set.

The proof of mailing consisted of the following circumstantial evidence: (1) the letter originated in Philadelphia, Pennsylvania, and found its way to Hartford, Connecticut; (2) an employee of the insurance company in Hartford testified that the letter came in the mail, based on a general practice he was aware of that such materials were sent by the mails; and (3) the words, at the bottom of the letter, "certified mail, return receipt requested."

This is not a "clear" failure of the Government to make out its proof. *Burks v. United States*, 427 U.S. 1, 17 (1978). On the contrary, I am satisfied that a reasonable jury could conclude the letter and its enclosure were sent through the United States mails. 18 U.S.C. § 1341.

I have considered Friel's other assignments of error, unsupported by memoranda: I remain persuaded that the several trial rulings challenged by Friel were correct, for reasons sufficiently stated at the time.

Accordingly, Friel's motions for a new trial and judgment of acquittal are DENIED and sentencing is set for 9 a.m. August 28, 1981 in Courtroom 13B, 601 Market Street, Philadelphia, Pennsylvania.

/s/ LOUIS H. POLLAK
Pollak, *J.*

APPENDIX C

UNITED STATES DISTRICT COURT
FOR EASTERN PENNSYLVANIA

Docket No. 80-00315-01

UNITED STATES OF AMERICA

vs.

JOHN W. FRIEL,

Defendant

Judgment and Probation/Commitment Order

August 28 1981

In the presence of the attorney for the government Joseph Gontram, the defendant appeared in person on this date with counsel, OSCAR N. GASKINS, ESQUIRE.

• • •

There being a verdict of GUILTY, Defendant has been convicted as charged of the offense of mail fraud in violation of Title 18 USC § 1341.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS.

Sentence shall commence September 11, 1981, unless an appeal has begun.

• • •

Signed by U.S. District Judge

/s/ LOUIS H. POLLAK
Louis H. Pollak
Date August 28 1981

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MALCOLM H. WALDRON, JR.
OF COUNSEL

June 1, 1979

Security Insurance Group
1000 Asylum Avenue
Hartford, Connecticut 06101

Re: Bromwells Inc.
Policies - 335959
335960
Date of Loss 5/7/79

Gentlemen:

Please be advised that I represent the above captioned insured in connection with their loss of May 7, 1979. Enclosed herewith please find a proof of loss in the amount of $40,000. covering the business interruption policy, and a proof of loss in the amount of $100,000. covering the contents, together with a list of the inventory.

Very truly yours,

MALCOLM H. WALDRON, JR.

MHW,JR./cw

encls.

cc: General Adjustment Bureau

Certified Mail

Return Receipt Requested

GOVERNMENT EXHIBIT 7

APPENDIX D

A7

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OCTOBER TERM, 1982

JOHN W. FRIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
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Washington, D.C. 20530
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TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-261

JOHN W. FRIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his mail fraud conviction.

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three years' imprisonment. The court of appeals affirmed without opinion (Pet. App. A1-A2).

1. The evidence showed that petitioner was the half-owner of a restaurant (Tr. 2.98) that was destroyed by a fire. In the opinion of the fire marshal, the fire was arson that originated in the dumbwaiter (Tr. 8.13, 8.15). The restaurant was experiencing financial difficulties prior to the fire (Tr. 2.109, 3.20-3.21, 3.148-3.149, 4.25-4.26, 5.68, 6.120, 6.123, 6.190, 7.75), and petitioner had stated that he needed money for another venture (Tr. 5.11-5.12, 5.34, 5.71). Petitioner had also expressed a desire and intention to burn the restaurant

(Tr. 3.25-3.26, 3.32-3.33, 6.99), had pointed out places where a fire might be set (Tr. 3.27), and had stated that the dumbwaiter was the best place (Tr. 3.29). On the day of the fire, a flammable rug cleaning fluid was brought into the restaurant (Tr. 3.16-3.17, 5.88-5.90, 5.92), and some of the furnishings were removed (Tr. 5.19, 5.95). Petitioner was the last person to leave the restaurant prior to the fire (Tr. 7.139), and appeared to be undisturbed while watching the fire (Tr. 5.99, 7.42).

The proof of loss statement, which was prepared at petitioner's direction for submission to his insurer (Tr. 6.135, 12.98, 12.128, 12.150), misrepresented and overstated the restaurant's contents (Tr. 3.100, 3.103-3.104, 4.129, 5.102, 6.139; Gov't Exh. 7), and petitioner personally told the chef to overstate the amount of food in the restaurant (Tr. 6.139-6.140). Petitioner signed and swore to the proof of loss, including the representation that he had not caused the loss and that no attempt was made in the attached schedules to deceive the insurance company (Tr. 7.130; Gov't Exh. 7). The statement was sent to the insurance company's home office in Hartford, Connecticut, along with a cover letter from petitioner's attorney that bore the notation "Certified Mail, Return Receipt Requested" and indicated that a copy was sent to the local adjuster in Philadelphia (Tr. 7.63; Pet. App. A7). The director of property claims for the insurance company testified that the proof of loss was received through the mail (Tr. 7.58); his assertion was based on the fact that the correspondence was received in Hartford with the certified mail notation and the fact that such materials are usually received by mail (Tr. 7.62-7.63).

2. Petitioner contends that there was insufficient evidence that he caused the mailing of the proof of loss statement to the insurance company or that the proof of loss was in fact transmitted via mail. Both facets of his contention

raise factual issues that were properly resolved against him below and do not warrant further review by this Court.

a. Petitioner acknowledges that the proof of loss statement was essential to the insurance claim and hence to the fraud (Pet. 8),[1] but he argues that—because all negotiations were conducted with a local Philadelphia adjuster—conveyance of the proof of loss statement by mail to Hartford was an unauthorized and "uncontemplated aberration" on the part of his attorney. The argument is without substance. Petitioner was well aware that the local adjuster was merely an agent for the insurance company. The final settlement, including the proof of loss upon which it would be based, had to be forwarded for approval to the company—which petitioner knew was located in Hartford[2]—before the claim could be paid. Particularly in view of the distance involved, the mail was the most likely means of transmittal. Since petitioner knew or reasonably should have known that execution of the fraudulent scheme required that the proof of loss be sent to the company via the mail, it is immaterial that he may not have "contemplated" that his attorney would mail it. See *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954) (one causes the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended * * *").

b. Whether the mail was used to transmit the proof of loss statement was an issue of fact that could "be established, like most other facts, by circumstantial evidence."

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[1]Accordingly, petitioner's reliance on cases (Pet. 7-8) dealing with mailings the contents of which were immaterial to or did not further the fraudulent schemes is misplaced.

[2]The insurance policy indicated that the company's home office was in Hartford (Gov't Exh. 6), and the proof of loss statement that petitioner signed reflected the same address (Gov't Exh. 7).

Stevens v. *United States*, 306 F.2d 834, 836 (5th Cir. 1962); *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2d Cir.), cert. denied, 404 U.S. 858 (1971). As the district court properly held in denying petitioner's motions for a new trial and judgment of acquittal (Pet. App. A4), the distance of the transmission, the testimony concerning general practice and the certified mail notation on the cover letter provided sufficient evidence to enable the jury to conclude that the mails had been used.[3]

Petitioner's claim (Pet. 9-11) of a conflict among the circuits is groundless. *United States* v. *Dondich*, 506 F.2d 1009, 1010 (9th Cir. 1974), accepted the principle that mailing can be proved by circumstantial evidence, including evidence of general practice; the conviction was reversed only because the government failed to offer *any* evidence of business custom or practice from which an inference of mailing could be drawn. In *United States* v. *Joyce*, 499 F.2d 9, 18-19 (7th Cir.), cert. denied, 419 U.S. 1031 (1974), the conviction on one count, based on an intracity letter, was reversed because the recipient testified that the letter would have been marked with the same receipt stamp whether it was hand-delivered or delivered by mail; conviction on another count, however, was affirmed where the letter on which the count was based was sent interstate (as here) and the sender testified that "in all probability" he mailed it. And while *United States* v. *Baker*, 50 F.2d 122, 123-124 (2d Cir. 1931) held that distance of transmittal, stamping of the

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[3]The district court entered a verdict of acquittal on a second count based on a letter sent within Philadelphia because there was no evidence establishing that it had been mailed rather than hand-delivered (Tr. 9.29, 9.33). There is little likelihood, however, that a letter from Philadelphia to Hartford would have been hand-delivered, nor does petitioner suggest there is any evidence of hand-delivery.

letter with the recipient's incoming mail stamp and testimony concerning general practice were insufficient to establish mailing, it is a 50 year-old decision by a divided court that has been consistently rejected as precedent within its own circuit. See e.g., *United States* v. *Leathers*, 135 F. 2d 507, 511 (2d Cir. 1943); *United States* v. *Fassoulis, supra*, 445 F.2d at 17; *United States* v. *Toliver*, 541 F.2d 958, 966 (2d Cir. 1976).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[4]The Second Circuit, in *Leathers*, *Fassoulis* and *Toliver*, distinguished *Baker* on the ground that in *Baker* there was testimony that the letters might have been delivered by hand and there was no direct proof of mailing. Moreover, even in *Baker* the court acknowledged that proof of mailing may be established by circumstantial evidence. 50 F. 2d at 123.